COA NO. 48012-3-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

ALEXIS SCHLOTTMANN, Appellant

PRP REPLY BRIEF OF APPELLANT

Mitch Harrison

Attorney for the Appellant

Harrison Law Firm

1st Avenue West #320

Seattle, Washington 98119

Tel (253) 335 - 2965

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Appellate Court Cases

I. IDENTITY OF APPELLANT

In 2011, the petitioner, Alexis Schlottmann, was convicted of multiple felonies in Thurston County Superior Court, each conviction relating to three separate burglaries committed over a 24 hour period. Ms. Schlottmann was sentenced to a substantial prison term which she is still serving at the Washington State Corrections Center for Women. She filed her PRP, challenging the lawfulness of her confinement based upon these convictions on August 13, 2015 and now files this appropriate reply brief.

II. STATEMENT OF INCORPORATION

The previous assignments of error and the previous issues pertaining to the assignments of error raised by Ms. Schlottmann in her original Personal Restraint Petition are hereby incorporated by this reference as though fully set forth.

III. ASSIGNMENTS OF ERROR ON REPLY

Without waiving the previous assignments and arguments made in the original Personal Restraint Petition, Ms. Schlottmann seeks to focus this reply on the following three arguments: (1) Ms. Schlottmann's PRP was timely filed; (2) there was insufficient evidence presented to the jury to support a conviction for first degree burglary of the Finely residence and that actual possession of a firearm is insufficient to prove the perpetrator was armed with a deadly weapon; and (3) that it was an error to enter convictions for theft and possession of stolen property, when both

charges are based on Ms. Schlottmann's possession of the Winkelman credit card. Ms. Schlottmann is therefore entitled to relief because her PRP is timely, and she has demonstrated a complete miscarriage of justice

IV. SUMMARY OF STATE'S RESPONSIVE ARGUMENTS

The state responds with ten arguments: (1) Ms. Schlottmann's PRP was time-barred; (2) there was sufficient evidence presented to the jury to support a conviction for first degree burglary of the Finely residence and that actual possession of a firearm is sufficient to prove the element that the perpetrator be armed with a deadly weapon; (3) the evidence presented at trial was sufficient to support Schlottmann's convictions for residential burglaries of the Japhet and Winkelman residences; (4) the evidence was sufficient to support Ms. Schlottmann's convictions for malicious mischief at the Japhet and Winkelman residencies; (5) that by charging Ms. Schlottmann as either a principal or an accomplice to the crimes of second degree possession of stolen property, a jury instruction regarding constructive possession would be irrelevant; (6) the evidence was sufficient to prove that Ms. Schlottmann was at least an accomplice, if not a principal, in the theft of the checkbook from the Japhet residence and the credit card from the Winkelman residence and that this same evidence was also sufficient to prove that the theft from the Japhet residence exceeded $750 and that Ms. Schlottmann intended to deprive Winkelman of the credit card; (7) because Ms. Schlottmann was charged as either a principal or an accomplice to the theft of a firearm, and because she clearly

participated in the burglary of the residence from which it was stolen, it is irrelevant whether she handled the firearm or knew that Lockard stole it; (8) it was an error to enter convictions for both the theft of the credit card from the Winkelman residence and possession of stolen property for possessing the same credit card but that Ms. Schlottmann is not entitled to relief because her PRP is untimely, and even if not, she does not show a complete miscarriage of justice; (9) defense counsel was not ineffective for failing to argue that some of Ms. Schlottmann's offenses constituted the same criminal conduct and even if that argument were available, Ms. Schlottmann does not demonstrate a likelihood that the court would have granted such a request; and (10) a PRP is not an appeal, Ms. Schlottmann carries a much higher burden than she did on direct appeal and she has failed to carry that burden.

V. REPLY ARGUMENTS

A. MS. SCHLOTTMANN'S PRP IS NOT TIME-BARRED.

The State incorrectly argues that Ms. Schlottmann's PRP was untimely. The State correctly states that that Schlottmann's original PRP was filed in the Court of Appeals, Division I on August 13, 2015. The state also correctly states that a PRP was due on August 13, 2015, one year after the mandate, which was entered on August 12, 2015. However, The state incorrectly states that because Ms. Schlottmann originally filed her PRP in Court of Appeals Division I and her PRP was not transferred to the correction Division, Division II, until August 17, 2015, that her PRP was untimely.

According to RAP 18.23, "a pleading will be considered timely filed by the Supreme Court and the Court of Appeals if it is timely filed in *any* Division of the Court of Appeals or in the Supreme Court." In *In Re Bonds*, the Court held that when the State filed their pleading in Division Two of the Court of Appeals on December 14, 2007, the deadline for filing their pleading, and the pleading was not transferred to the Supreme Court until December 18, 2007, and was technically four days late, that under RAP 18.23, the pleading was considered timely. *In re Bonds*, 165 Wash. 2d 135, 144 (2008).

Here, the State admits that Ms. Schlottmann filed her PRP in the Court of Appeals, Division I on August 13, 2015. Applying RAP 18.23 as the rule plainly reads and as the Supreme Court applied it in *In re Bonds*, Ms. Schlottmann's pleading is considered timely because it was filed within one year of the mandate in any Court of Appeals or Supreme Court.

B. THE STATE CANNOT SHOW THAT MS. SCHLOTTMANN WAS IN POSSESSION OF A FIREARM DURING THE ROBBERY OF THE FINLEY RESIDENCE.

The State argues that because either Ms. Schlottmann or her fellow burglar physically carried the guns from the Finley residence, they were considered armed for purposes of a first degree burglary charge. However, if a defendant or accomplice is merely in constructive possession of a weapon, or in close proximity to the weapon, they are not so armed. *State v. Schelin*, 147 Wn. 2d 562, 565-66 (2002).

The State must establish a nexus between the weapon and the crime. *State v. Gurske*, 155 Wn. 2d 134, 142 (2005). In cases such as this one, where the weapon is not actually used in the commission of the crime, there has to be

enough evidence from which the jury can infer that the weapon was there to be used, or that the defendant or accomplice displayed an intent or willingness to use the firearm. *State v. Brown*, 162 Wn. 2d 422.

The State argues that physically carrying the guns from the Finley residence means that Ms. Schlottmann was in actual possession of the guns, not in constructive possession. However, the Court has held that the difference between constructive possession and actual possession cannot be reduced to a single factor. Instead, the determination is made by looking at the totality of the circumstances. *State v. Collins*, 76 Wash.App 496 at 501 (1995). For a Court to find that there was actual possession, there needs to be more than a passing control, such as a momentarily handling. *State v. Callahan* 77 Wash.2d 27 (1969). Since the State cannot establish that Ms. Schlottmann had more than mere, passing possession of the guns, they cannot establish that she, or her accomplice, had actual possession of any gun.

Due to the arguments made in Ms. Schlottmann's Personal Restraint Petition and the arguments above, the Defense requests that this Court vacate Ms. Schlottmann's conviction for first degree burglary with orders to enter a conviction on the lesser offense and resentence her accordingly.

C. MS. SCHLOTTMANN'S CONVICTIONS VIOLATE DOUBLE JEOPARDY AND REQUIRE A NEW OFFENDER SCORE TO BE CALCULATED, SO THAT A MISCARRIAGE OF JUSTICE MAY BE PREVENTED.

Ms. Schlottmann was charged with second-degree theft for stealing the credit card from the Winkelman residence (Count 7, CP 35) and with second degree possession of stolen property for possessing the same credit card. Count

13, CP 37. She was found guilty of both, CP 108, 114, and sentenced for both. CP 119.

The State admits that when a defendant is convicted for both stealing and possessing the same property, the possession of stolen property must be dismissed, citing both *State v. Hancock* 44 Wash. App. 297 (1986) and *State v. Richards* 27 Wn. App 703, 707 (1997).

The state incorrectly argues that because the PRP was untimely filed, that Ms. Schlottmann is not entitled to any relief. See Reply Argument A: Ms. SCHLOTTMANN'S PRP IS NOT TIME-BARRED beginning on page 3.

The State continues, that even if this argument is not time barred, Ms. Schlottmann does not demonstrate a complete miscarriage of justice. While Ms. Schlottmann admits that the State is allowed to bring multiple charges arising from the same criminal conduct in a single proceeding, *State v. Michielli*, the State is not allowed to enter multiple convictions for the same crime without violating their Fifth Amendment right to freedom from double jeopardy. *State v. Freeman.* 153 Wash.2d 765 (2005); *State v. Michielli* 132 Wash.2d 229, 238-39 (2002).

The State contends that even if the two charges should have been merged, that a miscarriage of justice would not have occurred, because Ms. Schlottmann's offender score would have only been reduced by one point (moving it from eleven to ten). The range that Ms. Schlottmann's offender score fell in was the range of nine and above. The state contends that as such, the move from eleven to ten is immaterial, and would not affect her eventual sentencing.

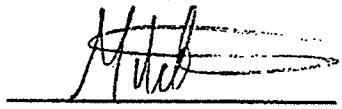
In making this argument, the state fails to consider that Ms. Schlottmann is contending that there was more than one violation of the merger doctrine, and as such, her offender score could be reduced by more than one level. If she succeeds on all her merger arguments, Ms. Schlottmann's score would be reduced low enough that she would be in a different offender score range, and as such a "miscarriage of justice" as the state calls it, can be demonstrated.

VI. CONCLUSION

For the foregoing reasons and the reasons stated in the original PRP, this Court should rule that the original PRP was timely filed, and grant all relief requested in the original PRP.

Dated this 19th day of January, 2016,

Respectfully submitted,



Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Julie M. Pendleton, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of the attached document on the following in the manner indicated below:

Court of Appeals Division II FAX: (253) 593-2806	☒ Facsimile ☐ In Person
Jon Tunheim Thurston County Prosecuting Attorney 2000 Lakeridge Drive SW Building 2 Olympia, WA 98502	☒ U.S. Mail ☐ Email:
Alexis Schlottmann DOC # 361791 3420 NE Sand Hill Road Belfair, Washington 98528	☒ U.S. Mail ☐ Email: ☐ Fax:

DATED this 19th day of January, 2016

at Seattle, Washington.

Julie M. Pendleton

FAX

Date:	01/19/2016
Pages including cover sheet:	*12*

To:	2535932806@rcfax.com
Phone	
Fax Number	*+12535932806*

From:	Mitch Harrison
	Harrison Law
	101 Warren Ave North Ste 2
	Seattle
	WA 98109
Phone	*(206) 732-6555 * 101*
Fax Number	*(206) 732-6555*

NOTE:

Case No. 48012-3-II; Reply Brief of Appellant

RECEIVED
JAN 19 2016
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON